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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

CHARLES A. GIVENS, Petitioner,

versus

HERMAN H. MOLL, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Charles A. Givens original plaintiff in suit, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit, sustaining the judgment of the District Court which held that the Federal Courts do not have jurisdiction to hear this matter.

OPINIONS BELOW

The memorandum opinion of Hon. John McDuffie, Judge of the United States District Court for the Southern District of Alabama is contained in the record pp. 170-171. The opinion of the Court of Appeals (R. 184-188) is reported in 177 F. (2d) 765. Thereafter your petitioner filed a petition for re-hearing which was denied. (R. 190-194)

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1949. (R. 189). The order denying the petition for rehearing was entered on January 12, 1950. (R. 194). The jurisdiction of this Court is invoked under the Act of February 13, 1925. Chapter 229, 43 Stat. 936; 28 U.S.C.A. 350, P. 376.

QUESTION PRESENTED

Whether the Courts of the United States have jurisdiction to hear this matter:

A. Because the matter in controversy exceeds, exclusive of interest and costs the sum of $3000.00, and is between citizens of different States.

B. Arises under the Constitution or Laws of the United States.

STATEMENT

This litigation arose as the result of the mal-administration and complete disposal of the entire estate of James A. Givens who died on June 30, 1921, in Escambia County, Alabama.

Decedent left a widow and nine children as his heirs, all of whom are residents of Alabama, except your petitioner who is a resident of the State of Florida.

Your petitioner in his complaint named his co-heirs as nominal defendants together with several real defendants, all of whom are likewise residents of the State of Alabama. The only exception to the foregoing is that W. E. Duggan is a resident of Florida, however, there are no facts alleged in the complaint upon which relief could be granted against Duggan and your petitioner in

both the District Court and Court of Appeals, requested that the complaint be dismissed as to him since he was neither a necessary nor indispensible party.

The opinions of both the Lower Courts hold that while the co-heirs are joined as nominal defendants they should be aligned as parties-plaintiff, thus destroying the necessary diversity; and that the presence of Duggan likewise destroys the necessary diversity.

This litigation involves a very large sum of money, certainly exceeding $3000.00, exclusive of interest and costs.

Alternatively, petitioner contends that the facts alleged in the complaint present a Federal question in that your complainant was deprived of his lawful inheritance without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The facts in the complaint allege that one of the defendants, Hugh M. Caffey, Jr., an Alabama attorney, was selected by the administratrix to represent her and the nine children, several of whom were then minors, in the handling of the estate. This attorney accepted his employment, ostensibly acting under the authority of the Probate Court of Escambia County, Alabama. Thereafter, through divers means, such as mortgages, foreclosures, and tax sales, all being accomplished through the Alabama Courts, Mr. Caffey, together with other persons, all friendly and close associates with him, secured title to the lands owned by the estate.

In one instance, after foreclosure, a deficiency judgment was rendered and additional lands were levied upon and sold, which proceedings were had without the au-

thority of the Probate Court of Alabama for the mortgage and sale of lands belonging to infants, expressly contrary to Section 5857, Code of Alabama, now known as Section 252, Title 61, Code of Alabama 1940; and Section 5861 of the Code of Alabama 1923, now known as Section 255, Title 61, Code of Alabama 1940; that thereafter the Supreme Court of Alabama did uphold the validity of the foreclosures, as shown in the case of *Wiggins Estate Company v. Jeffery, et al.*, 19 So. (2d) 769, 246 Ala. 183.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that the requisite diversity of Citizenship does not exist.

A. Because the complaint failed to claim the required diversity. It is unnecessary that the complaint, in general terminology of conclusions, specifically claims diversity of citizenship since the complaint as a whole may be viewed by the Court since the allegations of domicile were alleged. *Rule No.* 8 (a) (1) of the *Federal Rules of Civil Procedure.*

B. In holding in its opinion that "Here claiming: that Duggan is neither an indispensable nor a necessary party and instead of dismissing the complainant for his joinder, he should be dismissed from it;". The effect of the Court's language is that whether Duggan is dispensable or indispensable should rest with the complainant and that the Court will not dismiss him from the complaint. This is contrary to the reported cases. *Williams v. Crabb*, 117 F. 193; *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 19 L. Ed. 260; *Omaha Hotel v. Wade* (1877), 97 U.S. 13, 24 L. Ed. 907.

C. In holding that "diversity is destroyed by naming the co-heirs as nominal parties defendant when they are in effect real parties plaintiff". Petitioner contends that their interests are different and separable. *Seeley et al. v. Cornel et al.*, 74 F. (2d) 353 (C.C.A. 5th, 1925); *Payne v. Hook* cited *Supra; Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 21 L. Ed. 657 (1873); *Williams v. Crabb*, cited *Supra*, (C.C.A. 7th, 1902); *Atwood et al. v. National Bank of Lima*, 115 F. (2d) 861 (C.C.A. 6th, 1940); *Waterman v. Canal-Louisiana Bank and Trust Company, et al.*, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909).

(2) In holding that there is no Federal question involved.

A. In holding that the actions and decisions of the Alabama Courts did not deprive petitioner of due process of law, or equal protection of the laws.

It is not necessary that fraud be attached to the decision nor that an attorney be the recipient of benefits of the judgment in order for a State Court to deprive one of his property without due process of law. *Scott v. McNeal*, 154 U.S. 34.

B. In failing to hold that when an attorney acts under direct authority of State statutes as a judicial officer in a Probate Court to carry out the provisions of the State law, that his acts in such cases are those of the State and that if done wrongly, may amount to a lack of due process or denial of equal protection within the meaning of the Fourteenth Amendment. C.J.S. Vol. 7, p. 706; *Booth et al. v. Fletcher*, 101 F. (2d) 676; *National Savings Bank v. Ward*, 100 U.S. 195, 15 L. Ed.

621; *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 84 ALR 527.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case has rendered a decision in conflict with the decisions of the Supreme Court of the United States as well as several other Circuit Court of Appeals as shown by the cases cited *Supra*, particularly in that the later and more considered opinions show that a party will be dismissed from the action when it is found that it is neither a necessary nor indispensable litigant. Also the decisioin in this case is contrary to the decision of *Payne v. Hook* and other similar cases cited *Supra*.

The Court of Appeals has likewise fallen into error by holding that the actions of State Courts and decisions thereof can not and do not present a Federal question. Many of the cases cited hereinabove clearly hold to the contrary, particularly *Scott v. McNeal*, and, *Ex Parte Virginia*, 100 U.S. 339; *Chicago, Burlington R.R. Co. v. Chicago*, 166 U.S. 226.

The writ should be granted herein for the further reason that the Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Honorable Court in that the protection of private citizens is required if an attorney by and with the aid of State judiciaries, can succeed in divesting individuals of their property through the mere pretense of judicial proceedings. Your petitioner presents to this Honorable Court for its deliberation, the fact that all of his inheritance is in the hands of an attorney (or his cohort's) of the Court, and officer thereof, who claims title thereto, by and with the sanction of the Court under whose authority he acted.

CONCLUSION

Petitioner respectfully requests that a Writ of Certiorari be granted.

Respectfully submitted,

HENRY C. VOSBEIN,
Attorney for Petitioner

March 1950.

APPENDIX

Section 5857, Code of Alabama, now known as Section 252, Title 61, Code of Alabama 1940:

> Sale for payment of debts; proof of insufficiency of personalty—On the day appointed for hearing an application for the sale of land for payment of debts, or on any other day to which it is continued, the applicant must show to the Court that the personal property of the estate is insufficient for the payment of debts; and such proof may be made by the deposition of disinterested witnesses, or by an oral examination of disinterested witnesses in open Court, which must be reduced to writing, and filed and carefully preserved, but not recorded and for all purposes shall be considered a part of the record.

Section 5861 of the Code of Alabama 1923, now known as Section 255, Title 61, Code of Alabama 1940:

> Probate Court—necessity of testimony taken for persons of unsound mind in sale of property. No order of sale of land belonging to any estate, whether for the payment of debts, or for division, must be made, when there are minors or persons of unsound mind or unknown parties interested

in such estate, unless the Probate Court has taken evidence by deposition as in equity proceedings, showing the necessity of such sale; and such evidence must be taken, whether the allegations in the petition are denied or not by the guardian appointed by the Court to represent the minors or persons of unsound mind or unknown parties; and any order of sale, made without a compliance with the requisites of this Section shall be wholly void.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 736

CHARLES A. GIVENS, Petitioner,

versus

HERMAN H. MOLL, ET ALS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPORTING BRIEF ON BEHALF OF CHARLES A. GIVENS, PETITIONER.

HENRY C. VOSBEIN,
Attorney for Petitioner.

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IN THE

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OCTOBER TERM, 1949

No.

CHARLES A. GIVENS, Petitioner,

versus

HERMAN H. MOLL, ET ALS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPORTING BRIEF ON BEHALF OF CHARLES A. GIVENS, PETITIONER.

May It Please the Court:

Charles A. Givens, plaintiff in suit, files this brief in support of his petition for the Writ sought. The complaint was dismissed for lack of Federal jurisdiction.

OPINIONS BELOW

The memoradum opinion of Hon. John McDuffie, Judge of the United States District Court for the Southern District of Alabama is contained in the record pp. 170-171. The opinion of the Court of Appeals (R. 184-188) is reported in 177 F. (2d) 765. Thereafter your

petitioner filed a petition for re-hearing which was denied. (R. 190-194)

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1949. (R. 189). The order denying the petition for rehearing was entered on January 12, 1950. (R. 194). The jurisdiction of this Court is invoked under the Act of February 13, 1925. Chapter 229, 43 Stat. 936; 28 U.S.C.A. 350, P. 376.

QUESTION PRESENTED

Whether the Courts of the United States have jurisdiction to hear this matter:

A. Because the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00, and is between citizens of different States.

B. Arises under the Constitution or Laws of the United States.

STATEMENT

This litigation arose as the result of the maladministration and complete disposal of the entire estate of James A. Givens who died on June 30, 1921, in Escambia County, Alabama.

Decedent left as his heirs, his widow, Rose E. Givens, a resident of the State of Alabama, and nine children, all of whom are residents of Alabama, except your petitioner, Charles A. Givens, who is a resident of the State of Florida. The other defendants named in the complaint are residents of the State of Alabama, except W. E. Duggan, who is a resident of the State of Florida.

There are no facts alleged in the complaint upon which relief can be granted against W. E. Duggan and your petitioner in both of the Lower Courts suggested that he be dismissed from the complaint since he is not a necessary nor indispensable party. His mother, brothers and sisters were joined as nominal parties defendant. Neither of the Lower Courts would strike Duggan as a defendant, although not finding him necessary or indispensable; said Courts however aligned petitioner's co-heirs as parties-plaintiff, then holding that this alignment destroyed the necessary diversity.

The litigation involves more than $3000.00, exclusive of interest and costs.

The defendant, Hugh M. Caffey, Jr., is an Alabama attorney who was selected by the administratrix of the Givens Estate, and had represented the decedent for several years prior to his death.

The defendant, Ed. Leigh McMillian, is also an Alabama attorney, and is the partner of Hugh M. Caffey, Jr., as well as president of Wiggins Estate Co., Inc., another defendant herein.

Mr. Caffey as such attorney, ostensibly acting under the authority of the Probate Court of Escambia County, Alabama, according to the complaint did proceed, among other acts, to do the following:

Mr. Caffey has had himself placed into possession by virtue of title of several tracts of the land owned by decedent; that in addition divers other persons, including his law partner, friendly and close associates of Caffey now have title to several other tracts of the Givens lands so that all of the lands are now owned by persons, other than the Givens heirs.

Further Caffey did fail and refuse to follow the wishes of the Administratrix and decedent to deliver to your petitioner a portion of the inheritance as instructed.

That the said Caffey succeeded in having title placed in his name, together with his associates, through the means of mortgages, foreclosures, and tax sales, all of which was accomplished through and with the aid of the Alabama Courts. (R. 12-23).

The complaint further alleges that one mortgage foreclosure resulted in a deficiency judgment on which an additional 2000 acres of land were levied and sold on the deficiency. All of said proceedings being without the authority of the Probate Court of Alabama for the mortgage and sale of lands belonging to infants, contrary to Section 252, Title 61, Code of Ala. 1940, and Section 255, Title 61, Code of Ala. 1940; (R. 17); that thereafter the Supreme Court of Alabama did uphold these legally void acts as reported in the case of *Wiggins Estate Co v. Jeffery et al.*, 18 So. (2d) 769, 246 Ala. 183. (R. 17).

To enumerate the many specific acts contained in the complaint would impose upon the time of this Honorable Court, particularly since the same are enumerated in the complaint. The complaint charges the defendants guilty with fraud, deceit, and trickery, from the inception, as well as throughout the administration of the estate. (R. 2-23).

Petitioner has an interest in this litigation, different than and adverse to several of his co-heirs herein. For instance, Gerald Stanley Givens was granted relief in *Wiggins Estate Co. et al v. Jeffery et al*, cited *supra*, whereas your petitioner according to the Alabama Court lost all his title to said property.

His sister, Louise Givens Jones, has sold her inheritance in her father's estate to C. A. Moulton *in toto*, so there is great possibility that her interest in this litigation, if any, is different than that of your petitioner. Your petitioner's mother, Rose E. Givens, has a dower right whereas your petitioner has a remainder right or interest in the real property in said litigation, and in addition there are various and sundry offsets and advances made to the various herein named defendant heirs and your complainant which may be considered as adverse to his interest.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that the requisite diversity of Citizenship does not exist.

A. Because the complaint failed to claim the required diversity. It is unnecessary that the complaint, in generaly terminology of conclusions, specifically claims diversity of citizenship since the complaint as a whole may be viewed by the Court since the allegations of domicile were alleged. *Rule No.* 8 (a) (1) of the *Federal Rules of Civil Procedure.*

B. In holding in its opinion that "Here claiming: that Duggan is neither an indispensable nor a necessary party and instead of dismissing the complaint for his joinder, he should be dismissed from it;". The effect of the Court's language is that whether Duggan is dispensable or indispensable should rest with the complainant and that the Court will not dismiss him from the complaint. This is contrary to the reported cases. *Williams v. Crabb*, 117 F. 193; *Payne v. Hook*, 74 U.S.

(7 Wall.) 425, 19 L. Ed. 260; *Omaha Hotel v. Wade* (1877), 97 U.S. 13, 24 L. Ed. 907.

C. In holding that "diversity is destroyed by naming the co-heirs as nominal parties defendant when they are in effect real parties plaintiff". Petitioner contends that their interests are different and separable. *Seeley et al. v. Cornell et al.*, 74 F. (2d) 353 (C.C.A. 5th, 1925); *Payne v. Hook* cited *Supra; Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 21 L. Ed. 657 (1873); *Williams v. Crabb*, cited *Supra*, (C.C.A. 7th, 1902); *Atwood et al. v. National Bank of Lima*, 115 F. (2d) 861 (C.C.A. 6th, 1940; *Waterman v. Canal-Louisiana Bank and Trust Company, et al.*, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909).

(2) In holding that there is no Federal question involved.

A. In holding that the actions and decisions of the Alabama Courts did not deprive petitioner of due process of law, or equal protection of the laws.

It is not necessary that fraud be attached to the decision nor that an attorney be the recipient of benefits of the judgment in order for a State Court to deprive one of his property without due process of law. *Scott v. McNeal*, 154 U.S. 34.

B. In failing to hold that when an attorney acts under direct authority of State statutes as a judicial officer in a Probate Court to carry out the provisions of the State law, that his acts in such cases are those of the State and that if done wrongly, may amount to a lack of due process or denial of equal protection within the meaning of the Fourteenth Amendment. C.J.S. Vol. 7, p. 706; *Booth et al. v. Fletcher*, 101 F. (2d) 676;

National Savings Bank v. Ward, 100 U.S. 195, 15 L. Ed. 621; *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 84 ALR 527.

ARGUMENT

1. *JURISDICTION CLAIMED AS A RESULT OF JURISDICTIONAL AMOUNT AND DIVERSITY OF CITIZENSHIP.*

It is not disputed that the amount in question exceeds the jurisdictional amount.

The Court of Appeals in refusing to reverse the Lower Court on the grounds that jurisdiction existed, held: "We cannot at all agree. Nowhere in the course of the lengthy complaint is the requisite diversity claimed or even suggested", (R. 185), citing 35 C.J.S. p. 905, par. 77; *Chase Natl. Bank v. Citizens Gas Co.*, 314 U.S. 63; *Alexander v. Hillman*, 296 U.S. 222; *Dawson v. Columbia Ave. Savings Fund*, 197 U.S. 178.

Your petitioner submits that none of the foregoing citations is authority for the proposition announced by the Court. Instead, the answer seems to be found in Rule No. 8. (a) (1) of the *Federal Rules of Civil Procedure*, as follows: "General rules of pleading. (a) Claims for relief. A Pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain (1) a short and plain statement **OF THE GROUNDS** upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it". (Emphasis ours).

In this case, petitioner alleged the jurisdictional amount and the residence and domicile of each party litigant, which he submits is in compliance with the quoted rule.

With reference to petitioner's request in the Court of Appeals to dismiss Duggan, since he was neither necessary nor indispensable, the Court said: "Here claiming: that Duggan is neither an indispensable nor a necessary party and instead of dismissing the complaint for his joinder, he should be dismissed from it:". (R. 186-187). The Court makes no further reply to the request, therefore the effect of the language is that whether Duggan is dispensable or indispensable matters not as it is the duty of pleader to dismiss him. This is contrary to a series of reported cases. *Williams v. Crabb, Payne v. Hook, Omaha Hotel v. Wade,* all cited *Supra.*

Finally the Court apparently holds, that while the co-heirs are joined as nominal parties defendant they are in fact real parties plaintiff, and thus destroys the necessary diversity.

Before discussing the authorities, contrary to the Court's holding, your petitioner states that his interest in this estate is different than and separable from the other heirs.

In *Wiggins Estate Co., et al. v. Jeffery, et al.,* the Supreme Court of Alabama reversed the judgment as to petitioner's minor brother, Gerald Stanley Givens, and affirmed it as to petitioner, who was also a minor at the time of the mortgage foreclosure. His sister, Louise Givens Jones, sold all her interest in the estate; his mother has a dower right; several of the other heirs have been made advances and have off-sets against their interests. The Court of Appeals did not discuss this feature of your petitioner's case.

The exact point in question was answered by the Supreme Court of the United States in the year 1868

with the decision of *Payne v. Hook* cited *Supra*, wherein it was stated:

> "the complainant sues as next of kin, and names the other distributees, who have the same common interest without stating of what particular state they are citizens. It is fair to presume in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but with the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked."

The Court in the later case of the *Omaha Hotel Co. v. Wade* cited *Supra*, reaffirmed this principle by stating:

> "It is true beyond doubt that all persons materially interested in the fund to be distributed should be made parties to the litigation; but this rule, like all general rules, will yield whenever it becomes necessary that it should be modified in order to accomplish the ends of justice. Authorities everywhere agree that exceptions exist to the general rule; and this court decided that the general rule will yield if the court is able to proceed to a decree and do justice to the parties before the court without injury to others not made parties, who are equally interested in the litigation."

And as was said in the case of *Madison v. Craven*, 164 F. 471;

> "where two or more persons are entitled to separable, although precisely similar claims, charged on real estate, join in a bill for the enforcement

of their claim, and the bill was amended by omitting one or more of such persons in order that it might not fall for want of jurisdiction and for want of the requisite diversity of citizenship, and the bill proceeded by the one for the enforcement of his claim, the amended bill stated the persons omitted 'consents' to the relief sought in such bill and to all proceedings had and to all orders or decrees made or that may be made by the court in the cause, the circumstances did not disclose collusion, and the bill as amended was not demurrable."

The point is again answered by the case of *Williams v. Crabb* (C.C.A. 7th) cited *Supra*, wherein it is said:

"Nor can the objection prevail that Helen Alexander is not made a party defendant or a party complainant with her brother, having an equal interest in the estate of her sister with the complainant. She is not an indispensable party. The ground of demurrer is that she was not made a defendant, but she has no interest adverse to that of the complainant, and so should not be made a defendant. It is not objected that she is not made a co-complainant. She would have been a proper party complainant, and possibly a necessary, as distinguished from an indispensable party."

And, further:

"The utmost consequence that could follow would be that the defendants might be subjected to another suit by Helen Alexander, but that would be no hardship compared with turning the complainant out of court, who would now, no doubt, be barred, under the statute, from commencing another action so far as the will is concerned."

The Court of Appeals for the Fifth Circuit in the case of *Seeley et al v. Cornell et al.*, cited *Supra*, gives a clear expression of the prevailing law, which is in conflict with the opinion herein. In speaking of indispensable parties, the Court said:

> "The rule as to who are considered indispensable parties in a suit in equity in federal courts has been repeatedly announced by the Supreme Court. In substance, it is this: Where the interests of the parties before the court are separable from those of the parties omitted, and the court can do justice between the parties before it, without prejudice to the rights of the absentees, jurisdiction will be maintained. It is unnecessary to attempt to review all the cases. As applicable to the issues presented in this case, the following cases involving analogous issues, illustrate the rule: In *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657, the suit was by heirs against an administrator for an accounting. It was held that, as the interests of the heirs were separable, some, whose inclusion would defeat jurisdiction based on diversity of citizenship, were not indispensable parties and could be dismissed. In *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, the suit was by one distributee against an administrator of an intestate's estate and the surety on his bond. It was held that the surety was properly joined, and that other heirs were not indispensable parties, as the court could frame a decree to do justice to the parties before it without prejudice to the rights of the absent parties equally interested. In *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80, an estate was under administration in a state court. The suit was against the executor by one claiming to be an heir at law to establish his interest in the estate, to set aside certain legacies, and to compel the executor to pay to plaintiff his share of

> the estate. It was held that another heir omitted was not an indispensable party; that, while the federal court could not grant all the relief prayed for and payment could be only in due course of administration, that fact would not defeat jurisdiction, as a decree could be entered preserving the rights of all parties. In *Stephen v. Beall*, 22 Wall. 335, 22 L. Ed. 786, one of four tenants in common had attempted to mortgage the whole estate. It was held that a suit could be maintained against the mortgagor to subject her one-fourth interest in the land to the mortgage without making the other joint tenants parties."

In conclusion, petitioner submits that since the Alabama Supreme Court rendered judgment against all the heirs except one, that their interests are necessarily separable.

And further, whether separable or not the holding of the foregoing cases is to the effect that one heir of several may institute suit for recovery of his share without joining his co-heirs, since they are not indispensable.

2. *JURISDICTION CLAIMED BECAUSE A FEDERAL QUESTION IS PRESENTED.*

The jurisdiction of the Federal Courts is found as to this case in Title 28, Section 41 of the Revised Statutes of the United States, the first paragraph thereof reading in part as follows:

> "The District Courts shall have original jurisdiction as follows: (1) of all suits of a civil nature in common law or in equity—when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00, and (a) arises under the constitution and laws of the United States, or treaties made, or which shall be made,

under that authority (b) between citizens of different states."

Your petitioner contends that the Federal Courts have jurisdiction based on a Federal question under two specific grounds:

1. That judicial acts and decisions of the Alabama Courts deprived petitioner of due process of law or equal protection of the laws, as granted by the Constitution of the United States.

2. That when an attorney acts under direct authority of a Court, as an officer of such Court, and fraudulently deprives one of his property, that such acts amount to a lack of due process or denial of equal protection within the Fourteenth amendment.

JUDICIAL ACTS OF A STATE

In Alabama, as in other states, no person has the right to the property of their ancestors except by and through an administration conducted by and through the courts, in Alabama it being Probate Court.

That as a result of the required legal procedure, your petitioner was deprived of his inheritance because title to all the estate in descent and distribution is in the hands of persons other than the heirs. The Court in such case acted through its officer, Hugh M. Caffey, Jr., attorney. Since all actions of said attorney were under the direct authority of the Court of Alabama, your petitioner contends that the State of Alabama has deprived him of his property without due process of law and also has denied him equal protection of its laws.

Since the violation exists, the Federal Court has

either appellate jurisdiction or original jurisdiction to enforce the provisions of the United States Constitution.

The Court of Appeals however held that there is no merit to the foregoing contention.

Your petitioner feels that the following authorities are sufficient to show that the Court's opinion is erroneous:

The prohibition of the Fourteenth Amendment of the Constitution of the United States, declared in force July 28, 1868—"Nor shall any State deprive any person of life, liberty, or property, without due process of law"—so enlarged the scope of the Act of Congress, now Section 709, R. S., enacted December 1, 1873, regulating and limiting the appellate jurisdiction of the Supreme Court of the United States to review the judgments of State Courts, as to authorize and require that Court to review the judgment of a State Court, in a case involving private rights, depending upon State Law, to determine whether the State Court, in arriving at its judgment, did or did not give due effect to the existing established law of the State, whether common law or statute law, regulating the private rights in question; one effect of the above prohibition of the Fourteenth Amendment on Section 709, R. S., was to place the whole jurisprudence of the country under the protection of this Federal Tribunal of the Nation and to let all citizens feel everywhere and always, as a fixed reality, the fact that the Constitution of the United States and the laws of Congress passed in pursuance thereof, are the supreme law of the land.

It was originally held in *Murdock v. Memphis*, 20 Wall 590, that the Federal Courts were limited to the consideration of the Federal questions named in the con-

stitution and that the powers of the Court were not given by the Judicial Act, but by the Constitution, being, however, limited and regulated by the Judicial Act.

It would appear that later the Supreme Court of the United States first enunciated the principle that the prohibition of the Fourteenth Amendment of the Constitution—"Nor shall any State deprive any person of life, liberty, or property, without due process of law,"—operates to restrain State Judges. *Virginia v. Rives*, decided in 1879, 100 U.S. 313.

During the same term of Court in the Case, *Ex Parte Virginia*, 100 U.S. 339, Justice Strong, speaking with reference to the Fourteenth Amendment and in behalf of the Court, said "That prohibition has 'refer-to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State or of the officers or agents by whom its powers are exerted, shall deprive any person of life, liberty, or property, without due process of law.' Whoever, by virtue of public position under a State Government, deprives another of property, life or liberty, without due process of law,—violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."

This principle first enunciated by Justice Strong that the due process of law clause of the Fourteenth Amendment of the Constitution operates to restrain State Judges in the exercise of the judicial powers of

the State has been reaffirmed often, and is now a fixed cannon of the Constitutional law. *Scott v. McNeal*, cited *Supra; Chicago, Burlington & Quincy v. Chicago*, 166 U.S. 226; *Raymond v. Chicago Traction Company*, 207 U.S. 20.

The foregoing principle transposed into terms of constitutional rights of citizens means that every citizen has a right, title or privilete, recognized, declared, and protected, but not granted or created, by the due process of law clause of the Fourteenth Amendment, to have State Judges, when adjudicating upon his private rights of life, liberty, or property,—"to conduct themselves in conformity to the requirements of due process of law; in other words, it declares and protects the citizen's immunity for lawlessness, or want of due process of law in State Courts." *Logan v. U. S.*, 144 U.S. 263.

In one of the leading cases, *Scott v. McNeal*, cited *Supra*, the foregoing principle was clearly enunciated and has remained the law to date. In that case the matter in dispute was the ownership of a parcel of land in the State of Washington. Scott originally owned the land. Upon proof that Scott had been absent and never heard from for over a period of seven years, the Probate Court of the State found by virtue of statutes, that Scott was dead to all legal intents and purposes, and issued letters of administration upon Scott's estate to the Judgment Creditor of Scott. Subsequently, the land was sold at public auction and later acquired by McNeal. Scott, however, was alive and had no notice of the Probate proceedings until he reappeared and demanded his land from McNeal by an action of ejectment in the State Court of Washington. Scott contended that the proceedings were void because no administration of the estate of a live man was valid and that the Probate Court

was, therefore without jurisdiction. The trial court held the proceedings valid. On appeal it was argued, "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law". The Supreme Court of Washington upheld the judgment whereupon Scott took the case to the Supreme Court of the United States by writ of error, stating the proceedings to be absolutely void and that they deprived him of his property without due process of law, contrary to the Fourteenth Amendment of the Constitution. The Supreme Court of the United States took jurisdiction, reviewed the case, and reversed the judgment of the Supreme Court of the State of Washington.

It seems plain that the restraint of due process of law laid upon the State Judges by the Fourteenth Amendment provides the citizen with the security that State Judges, when passing upon private rights, will recognize and give effect to the existing, established State Law applicable to the private rights in question, by enabling him when injured in respect of his life, liberty or property, by their failure to do so, whether through want of *scientia* only or through want of *bona fides* as well, to invoke the aid of the United States, particularly its Judicial Department, to correct and undo the wrong, unwittingly or wittingly done.

The case of *Chicago, Burlington R.R. Co. v. Chicago*, cited *Supra*, is further authority for the restraint passed upon the State Courts and made subject to review by Federal Courts. In that case, Mr. Justice Harlan said, "But a State may not, by any of its agencies, disregard the prohibition of the Fourteenth Amendment. Its Judicial authorities may keep within the letter of the statute prescribing forms of procedure in the Courts and give

the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law, regard must be had to substance, and not to form."

Now that it has been shown that the Federal Courts have power and authority to review the action of State Courts by writs, it remains to be shown that the Federal Courts have similar power by enforcing its original jurisdiction, by suits instituted *ab initio* herein.

Full authority for such proceedings was enunciated by the Supreme Court of the United States in the case of *Raymond v. Chicago Traction Company*, cited *Supra*. The jurisdiction in question in that case was the original jurisdiction of the Circuit Court of the United States over cases arising under the Constitution and laws of the United States under Section One of the Judiciary Act of 1887-8 and not the appellate jurisdiction of the Supreme Court of the United States over State Courts under Section 109, R. S. The Court then upheld the original jurisdiction of the Circuit Court (now District Court).

It follows therefore that a violation of the due process of law clause of the Fourteenth Amendment can similarly be used to sustain the original jurisdiction of the Circuit Court. A thorough research reveals that the *Raymond* Case has never been overruled to this date.

It is further shown by the decisions in the cases of *Muhlker v. Harlem R.R. Co.*, 197 U.S. 544; *Birrel v. Harlem R.R. Co.*, 198 U.S. 390, and *Kierns v. Harlem R.R. Co.*, 198 U.S. 390, that judgments of the Courts of New York refusing to give land owners benefit of the doctrine of the New York Elevated Railroad Cases,

were wanting in due process of law under the Fourteenth Amendment, and, therefore, void. There the Supreme Court did review and correct alleged errors of the New York Courts in the determination and application of State law, and imposed upon the New York Courts its own view of the law of New York.

And now applying the foregoing legal principle to the facts of the case at bar, it is conclusive that this Honorable Court has jurisdiction of this case even eliminating the allegations in the complaint of falsehood, misrepresentation, trickery, deceit, or any other illegal or unlawful act on the part of the parties named defendants herein, in that plaintiff has been deprived of his rightful inheritance in the Givens estate through the process of the Judicial Department of the State of Alabama, constituting the Probate Court, The Chancery Division of the Circuit Court, and the Supreme Court of Alabama, by permitting and ratifying the mortgaging, foreclosing and sale of lands of the Givens estate, the majority of the heirs at the time being minors and contrary to the Statutes of Alabama, and more particularly to Sections 5857, Code of Alabama 1923 now known as 252, Title 61 of the Code of Alabama 1940 and Section 5861 of the Code of Alabama 1923, now known as Section 255, Title 61, Code of Alabama 1940, contained in the Appendix.

These sections disclose without question that the sale of minor's interest in land is void without an order of the Probate Court, first had and obtained, which order, as is contended, was never had or secured in this case. In addition thereto, the Supreme Court of the State of Alabama did further deprive the plaintiff of his right of property without due process of law as to a portion of the lands involved in this litigation by

virtue of the decision in the case of *Wiggins Estate et al v. Jeffery et al*, cited *supra*, and thus did attempt to ratify and confirm a void act of the Lower Court in confirming a sale of lands of minors herein shown, thus making said decision in effect retroactive and contrary to expressed statute.

In addition it is universally held that in the sale of infants lands, belonging to an estate, there cannot be a valid deficiency judgment. The Probate Court authorizes jurisdiction in rem only and consequently the authority of the administratrix is only in rem. Therefore, any judgment in the Probate Court of Alabama, or in any other Court of Alabama, rendered with reference to these estate lands, was void because there was a complete lack of jurisdiction. *Columbus Land, Loan & Building Association v. Welkens*, 146 Neb. 684, 165 ALR 1285, 21 NW (2) 418.

The Probate Court had no authority to grant a deficiency judgment since same created a personal liability therefore, a *fortiori*, the Supreme Court of Alabama could not ratify any such unauthorized action by its Probate Court. *Wolkens De Condres v. Union Trust Co.*, 25 Ind. App. 271, 58 NE 90, 81 Am. St. Rep. 95; *Morris v. Linto*, 4 Neb. (Unof.) 550, 95 NW 11 and 104 F. 584; *Meehan v. First National Bank*, 44 Neb. 213, 62 NW 490; *Federal Farm Mortgage Corp. v. Cramb*, 137 Neb. 553, 290 NW 440.

It must then be admitted that the proceedings in the *Wiggins Estate* case was in rem, not in personam, at least to the extent of the deficiency judgment rendered, and with reference to this situation the following comment was made by the Alabama Courts:

> "The granting of administration is in the nature of a proceeding in rem. The result is to

fix the legal title to the extent consistent with the statute in the personal representative. He holds it, not in his own person and not in his own right, but in trust for others. So far as he is personally concerned, he may, by his own acts of mal-administration, estop himself in certain cases from asserting title to property, which is the subject of such mal-administration."

Hopper v. Steel, 18 Ala. 831;

White v. Hill, 176 Ala. 487 (58 So. 44)

To be more specific, the mortgage which Hugh M. Caffery, Jr. foreclosed in the interest of the Givens estate against J. W. Elliot, covering 80 acres in the year 1922 was a part and parcel of the mortgage executed by Mrs. Givens, the widow, and the heirs of majority to Wiggins Estate Co. in the year 1926 covering 1684 acres and thereafter foreclosed by Wiggins in the year 1936 through Chancery Court proceedings and a deficiency judgment taken on which a sale was perfected on an additional 2000 acres of land. This mortgage originally covered 1684 acres, exclusive of the 2000 acres, and being the land involved in the Supreme Court of Alabama decision *Wiggins Estate Co., Inc. et al. v. Jeffery et al*, cited *supra*.

Your petitioner respectfully suggests to Your Honors that since the Supreme Court of the United States has seen fit to apply restraint of due process of law as applied to State Judges and other members of State Judiciaries, with the same rigor that the restraint has been applied for many years to State Legislators and to the United States Congress that, therefore, Your Honors should apply an equal restraint herein.

2. *ACTS OF AN ATTORNEY OF PROBATE COURT*

And now applying another legal principle to the facts of the case at bar, as demonstrated by the early cases cited previously in this brief, your appellant respectfully suggests to Your Honors that the acts of an attorney may result in the lack of due process of law, especially in view of the authorities to be hereinafter cited, independent of any breach by a Court.

First, as to the defendants made such as officers or instrumentalities of the State, either by operation of law or their own acts, in doing certain acts under color of office, or as instrumentalities of the judicial branch of the State Government. Sceondly, as to those defendants, while not officers of the State in any capacity, are nevertheless ones wrongfully enriched by and through the unlawful acts of persons alleged to be in such capacity. It is important to show which defendants are officers of the State Agency or the Judicial branch of the State Government, which persons are also, for the second reason as stated above, equally liable to your complainant and subject to the jurisdiction of this Court under the Fourteenth Amendment. The officers of the State definitely referred to within the operation of the Fourteenth Amendment are the defendants, Hugh M. Caffey, Jr., and Ed Leigh McMillan, together with others not named as defendants, but whose acts as State officers have resulted in your complainant being deprived of his property without due process of law. The law on the point in general in furtherance of your petitioner's contention that such defendants should be considered officers of the judicial instrumentality of the State is set out in C. J. S. Vol. 7, p. 706, as follows:

"an attorney is an officer of the court with an obligation to the public as well as to his clients. An attorney does not hold an office or public trust in the constitutional or statutory sense of that term, but is an officer of the court. He is, however, in a sense an officer of the State, with an obligation to the Court and to the public no less significant than his obligation to his client. The office of attorney is indispensable to the administration of justice, and is intimate and peculiar in its relation to, and vital to the well being of, the court. An attorney has a duty to aid the court in seeing that actions and proceedings, in which he is engaged as counsel are conducted in a dignified and orderly manner, free from passion and personal animosities, and that all causes brought to an issue are tried and decided on their merits only, to aid any effort under the court's direction to root out corruption and fraud, and also to devote his ability, and skill, and diligence along ethical and professional lines to the interest of his client, and to refrain from entering into any alliance or incurring any obligation connected with the litigation in which he is engaged as counsel that would place him in a position where his personal interest would be adverse to those of his client."

In view of the foregoing, it is contended that the defendants named as attorneys in their own right, and in occupying a position of confidential relationship with the administratrix of the estate of James Alexander Givens, decedent, are officers of the Judicial instrumentality of the State of Alabama. While it is conceded that the operation of the Fourteenth Amendment does not extend to any action of private individuals or the invasion of individual rights, it nevertheless is the law that parties unlawfully enriched because of the vio-

lation of this amendment are, and rightfully ought to be joined as, defendants in this action. Your petitioner is endeavoring to recover the res which he has been deprived of wrongfully at the hands of the officers of the State as herein set out and which property is now held by the several defendants named in this suit.

Your petitioner at this point would like to set out the authorities for the proposition that an attorney, particularly one while acting in a Probate Court, at all times supposedly by and with the consent of said Court, becomes an officer of the Court and the State who authorizes the individual to act as such.

Bouvier's Law Dictionary, p. 284, defines an attorney at law as "an officer in a court of justice who is employed by a party in a cause to manage the same for him".

In the State of Alabama it also has been held that an attorney at law is an officer of the Court. *Wise v. Miller*, 11 So. 903, and *In Re Willis, et al*, 242 Ala. 287, 50 So. (2d) 716. It has likewise been held by the various Federal Courts that an attorney is an officer of the Court. *Booth et al v. Fletcher*, 101 F. (2) 676; *National Savings Bank v. Ward*, 100 U.S. 195, 15 L. Ed. 621; *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 ALR 5627. In the case entitled, *In Re Arcturus Radio Tube Co.*, 35 F. S. 783, it was held "in reality, receivers and attorneys are officers of the Court."

It is stated in 5 Am. Jus., Title, Attorneys at Law, Section 6, "like the court itself, an attorney is an instrument or agency to advance the ends of justice."

Since it is clearly stated in the complaint that the affairs of the Givens estate was administered by the

direct and exclusive action of Hugh M. Caffey, Jr., and since the said attorney did in fact act in this position and exercised it in such fashion as to eliminate the wishes of the administratrix, we suggest to this Honorable Court that he thereupon became an executor-de-son-tort. Having taken this position unto himself, your petitioner contends that by such action and for that additional reason, he conferred jurisdiction upon this Honorable Court. The foregoing contention has been upheld in the Case of *Fraser v. Cole*, 214 F. 556, 131 CCA 102.

It is therefore respectfully contended that since said attorney while acting in the capacity of an officer of the State of Alabama did so use his powers to deprive your petitioner of his inheritance, that said acts constitute a violation of the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the authorities show that this is a case in which the Federal Courts have jurisdiction.

Therefore, your petitioner respectfully requests that a writ of certiorari issue therein.

Respectfully submitted,

HENRY C. VOSBEIN,
New Orleans, Louisiana,
Attorney for Petitioner.

March 1950.

APPENDIX

Section 5857, Code of Alabama, now known as Section 252, Title 61, Code of Alabama 1940:

> "Sale for payment of debts; proof of insufficiency of personalty—On the day appointed for hearing an application for the sale of land for payment of debts, or on any other day to which it is continued, the applicant must show to the Court that the personal property of the estate is insufficient for the payment of debts; and such proof may be made by the deposition of disinterested witnesses, or by an oral examination of disinterested witnesses in open Court, which must be reduced to writing, and filed and carefully preserved, but not recorded and for all purposes shall be considered a part of the record."

Section 5861 of the Code of Alabama 1923, now known as Section 255, Title 61, Code of Alabama 1940:

> "Probate Court—necessity of testimony taken for persons of unsound mind in sale of property. No order of sale of land belonging to any estate, whether for the payment of debts, or for division, must be made, when there are minors or persons of unsound mind or unknown parties interested in such estate, unless the Probate Court has taken evidence by deposition as in equity proceedings, showing the necessity of such sale; and such evidence must be taken, whether the allegations in the petition are denied or not by the guardian appointed by the Court to represent the minors or persons of unsound mind or unknown parties; and any order of sale, made without a compliance with the requisities of this Section shall be wholly void."